UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CASE NO. 5:89 CV 1988
	)	
v.	)	
	)	JUDGE PETER C. ECONOMUS
	)	
INDUSTRIAL EXCESS LANDFILL,	)	
INC., et al.,	)	
	)	
Defendants.	)	
	)	
	)	

UNITED STATES' RESPONSE TO BRIDGESTONE/FIRESTONE'S SURREPLY IN OPPOSITION TO UNITED STATES' MOTION FOR ENTRY OF *DE MINIMIS* PARTIAL CONSENT DECREES

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The United States has moved for entry of two *de minimis* consent decrees embodying settlements between Plaintiffs, the United States of America and the State of Ohio, and Defendants, Morgan Adhesives Co. ("Morgan") and PPG Industries, Inc. ("PPG"). Doc. #524. After briefing on the United States' Motion for Entry of *De Minimis* Partial Consent Decrees was complete, the Supreme Court handed down its decision in *United States v. Atlantic Research Corp.*, 551 U.S. __, 127 S. Ct. 2331 (June 11, 2007) ("*Atlantic Research*"), holding that a person in Atlantic Research Corporation's (ARC) position could assert a claim under Section 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607, against another liable party, even though ARC itself was a potentially responsible party ("PRP") with respect to the site. On August 27, 2007, Defendant Bridgestone Firestone North American Tire, LLC ("BFNT") filed a surreply in opposition to United States' Motion to Enter ("Surreply"). Doc. #619. BFNT asserts that *Atlantic Research* stands for the proposition that a private party, including a PRP that has itself incurred clean up costs, may pursue a claim to recover response costs under Section 107(a)(4)(B) of CERCLA, 42 U.S.C. § 9607(a)(4)(B) (Surreply at 3), that is not barred by CERCLA's contribution protection provisions. Surreply at 3-4. BFNT therefore asserts that even if the Court enters the *de minimis* consent decrees over its objections, it must be permitted to pursue its cost recovery claims against PPG and Morgan. Surreply at 2. Doc. #619. BFNT is wrong, and in any event the Court should grant the United States' Motion to Enter the *de minimis* consent decrees.[1]

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[1] BFNT also asserts more than once that the United States has moved to dismiss BFNT's actions against PPG and Morgan. Surreply, at 2, 3, 4. The United States has not done so.

SUMMARY OF ARGUMENT

Nothing in BFNT's Surreply affects whether or not the Court should enter the *de minimis* consent decrees. Therefore, the Court does not have to address the impacts of *Atlantic Research* at this time in order to enter the decrees. However, if the Court does address the Surreply, BFNT's arguments are incorrect. The *Atlantic Research* decision does not provide BFNT a cause of action under Section 107(a)(4)(B) of CERCLA against the *de minimis* settlors. Morever, even if the Court were to find that PRPs in the position of BFNT have an action under Section 107(a)(4)(B) of CERCLA, such a claim is not available against the *de minimis* settlors. Congress intended to provide *de minimis* parties with complete protection from further litigation from other parties such as BFNT.

I. NOTHING IN BFNT'S SURREPLY AFFECTS WHETHER THE COURT SHOULD ENTER THE CONSENT DECREES

Before addressing the fundamental argument raised by the Surreply, it is important to make clear that the issues raised in the Surreply are distinct from the United States' Motion to Enter. The motion pending before the Court for decision is the United States' motion for entry of the two *de minimis* Partial Consent Decrees, lodged with the Court on March 26, 2006. Doc. #524. If entered, the *de minimis* decrees would require the settling defendants to reimburse the United States (and in the case of Morgan, also the State of Ohio) for some of the Governments' response costs. In return, PPG and Morgan would each receive from the United States (and in the case of Morgan, also the State of Ohio) a covenant not to sue or to take administrative action under CERCLA relating to the Industrial Excess Landfill Site ("IEL Site" or the "Site") (PPG Decree ¶ 11; Morgan Decree ¶ 12). The *de minimis* consent decrees also reiterate that the

settlors would receive, pursuant to CERCLA, protection from claims by third parties for contribution for the matters addressed in the settlements, which in this case are all the costs incurred or response actions taken by any person, including the governments and BFNT, relating to the Site. (PPG Decree, ¶ 19; Morgan Decree, ¶ 21). The United States has already fully briefed the fairness of cutting off BFNT's claims for response costs. Memorandum in Support of United States' Motion For Entry of *De Minimis* Partial Consent Decrees ("Motion to Enter"), at 70-77 (Doc. #524).

BFNT's Surreply argues, relying on *Atlantic Research*, that it may pursue its outstanding Section 107(a)(4)(B) action against PPG and Morgan for costs BFNT claims to have incurred doing work at the IEL Site, and that the contribution protection from claims afforded by CERCLA does not act as bar. If BNFT is correct, then this would obviously undercut BFNT's objection to entry of the consent decrees, because, under its rationale, BFNT would be able to pursue claims against PPG and Morgan. *See generally* Motion to Enter. Doc. #524. If, on the other hand, BFNT is incorrect (as the United States will show below), it simply means that entry of the consent decrees will operate precisely as the United States previously described in its Motion to Enter the *de minimis* consent decrees. Thus, at bottom, BFNT's Surreply raises no new arguments, in addition to its prior arguments, in opposition to the Motion to Enter.

As set forth below, BFNT's assertions about the impacts of *Atlantic Research* are incorrect, and the Court should so rule. However, the Court does not have to address the impacts of *Atlantic Research* at this time in order to enter the *de minimis* consent decrees. That is because, even assuming that entry would cut off all of BFNT's claims against PPG and Morgan,

the consent decrees are fair, reasonable, and in the public interest for all the reasons the United States has previously set forth in its Motion to Enter. As the United States has demonstrated at length in its Motion to Enter, PPG and Morgan each sent a relatively small volume of waste to the IEL Site, and only an extremely small amount of that waste consisted of hazardous substances. Motion to Enter, at 21-26. Doc. #524. PPG and Morgan are paying amounts that are commensurate with their *de minimis* status; indeed, as set forth in more detail in the Motion to Enter, PPG and Morgan are paying amounts that exceed the low estimates of their respective waste volumes at the IEL Site and include a 50% risk premium using such estimates. *Id*. at 75. The parties already fully briefed the fairness of entering the *de minimis* decrees, including the fairness to BFNT of not being able to pursue claims against PPG and Morgan. *Id*. at 70-77, 96-98. BFNT's *Atlantic Research*- related argument brings nothing new on this basic point. Thus, the Court can enter the consent decrees without addressing the *Atlantic Research*-related issue.

II. THE *ATLANTIC RESEARCH* DECISION DOES NOT GIVE BFNT A CAUSE OF ACTION UNDER SECTION 107 AGAINST THE *DE MINIMIS* SETTLORS

A. *Atlantic Research* Does Not Provide a Broad Right of Action Under Section 107(a)(4)(B) to All PRPs.

BFNT asserts that the *Atlantic Research* decision "definitively establishes BFNT's right to pursue a CERCLA Section 107 cost-recovery cross-claim" against the *de minimis* settlors. BFNT Surreply at 2. BFNT is wrong. In fact, the Supreme Court in *Atlantic Research* did *not* hold that a PRP in BFNT's situation – a party that *has* a Section 113(f) contribution claim because it has been sued or has resolved its liability through a settlement with the government under CERCLA – may pursue a Section 107(a)(4)(B) cause of action. Rather, the Court held

only that a party in ARC's position – a PRP that had incurred costs doing cleanup in the absence of the compulsion of a lawsuit or settlement – has a Section 107(a)(4)(B) cause of action.

In *Atlantic Research*, the Supreme Court addressed the question of whether Section 107(a)(4)(B) of CERCLA authorizes suits by liable parties. The district court had held, following Eighth Circuit precedent and most courts of appeal prior to *Cooper Indus. Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) ("*Aviall*"), that the only available CERCLA claim by one PRP against another is a claim for contribution under Section 113(f). After *Aviall*, because ARC had not been sued by the government under Section 106 or 107 as required by Section 113(f)(1) and had not reached a settlement that conferred contribution rights under Section 113(f)(3)(B), it had no right to assert a contribution claim under Section 113(f) to recover any portion of its cleanup costs from other liable parties. The Eighth Circuit found that not allowing ARC to assert a claim under Section 107 would be "contrary to CERCLA's purpose . . . [and an] unjust outcome." *Atl. Research Corp. v. United States* ("*Atlantic Research I*"), 459 F.3d 827, 837 (8th Cir. 2006). The court of appeals thus reversed the district court, holding that

> a liable party may, under appropriate procedural circumstances, bring a cost recovery action under § 107. This right is available to parties who have incurred necessary costs of response, *but have neither been sued nor settled their liability under §§ 106 or 107.*

459 F.3d at 835 (emphasis added).

The Supreme Court affirmed the Eighth Circuit. In so doing, however, the Court did not hold, as BFNT suggests, that *all* PRPs that have spent money to clean up a site have a cause of action under Section 107(a)(4)(B). Rather, the Court held merely that ARC, which had incurred response costs "voluntarily," that is, without having been sued under Section 106 or 107, and

without having entered into a settlement for response costs or action, did. *Atlantic Research* , 127 S. Ct. 2339.

B. BFNT's Claim is for Contribution Under Section 113(f)(1), Not a Claim for Costs Under Section 107(a)(4)(B).

The Supreme Court specifically did not decide whether parties who perform work under the compulsion of a lawsuit (or settlement) have a Section 107 claim. *Atlantic Research,* 127 S. Ct. at 2338, n.6. But the Court's discussion of the difference between "cost recovery" pursuant to Section 107(a)(4)(B) and "contribution" pursuant to Section 113(f) makes clear that the Court would hold that BFNT's claim is under Section 113(f).

First, as the Court recognized, the plain language of Section 113(f)(1) authorizes BFNT to seek contribution in the circumstances presented here. *Atlantic Research,* 127 S. Ct. at 2337-38. Section 113(f)(1) provides, in relevant part:

> Any person may seek *contribution* from any other person who is liable or potentially liable under section 9607(a) [107(a)] of this title, *during or following any civil action under section 9606 [106]* of this title or under section 9607(a) of this title.

42 U.S.C. § 9613(f)(1) (*emphasis added*); *see Atlantic Research,* 127 S. Ct. at 2338. Under the explicit terms of Section 113(f)(1), the United States' suit against BFNT clearly provides BFNT with a contribution claim against other PRPs at the site.[2]

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[2] BFNT's consent decree with the United States provides an additional contribution claim. 42 U.S.C. § 9613(f)(3)(B); *see also Atlantic Research*, 127 S. Ct. at 2338 n.5. Note, however, that by asserting that BFNT has a claim under Section 113(f), we do not mean to suggest that BFNT may continue to pursue that claim in the face of the protection afforded to the *de minimis* settlors by Sections 113(f)(2) and 122(g).

Further, BFNT's claim is consistent with the Court's analysis of the types of claims that are properly brought pursuant to Section 113(f). The Court took pains to describe the difference between a claim under Section 107 and a claim under Section 113, rejecting the assumptions of most circuit courts prior to *Atlantic Research* and *Aviall*[3] that "the word 'contribution' [is] . . . synonymous with any apportionment of expenses among PRPs[,]" and that, thus, any action in which a PRP seeks to allocate costs among other PRPs must be brought pursuant to Section 113(f). *Id*. "Contribution," the Court continued, "is defined as the 'tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share . . . ." *Atlantic Research*, 127 S. Ct. at 2337-38 (citation omitted). The Court stressed that "§§ 107(a) and 113(f) provide two 'clearly distinct' remedies. *Cooper Indus.*, 543 U.S. at 163 n.3. 'CERCLA provide[s] for a *right to cost recovery* in certain circumstances, §107(a), and *separate rights to contribution* in other circumstances, §§113 (f)(1), 113(f)(3)(B).'" 127 S. Ct. at 2338. (Emphases in original) (citing *Cooper Indus*., 543 U.S. at 163). Thus, the Court continued,

> the remedies available in §§ 107(a) and 113(f) complement each other by providing causes of action to persons in different procedural circumstances. Section 113(f)(1) authorizes a *contribution action* to PRPs with common liability stemming from an *action instituted under §106 or §107(a).*

Atlantic Research, 127 S. Ct. at 2338. (emphasis added; internal quotations and citations omitted).[4] Thus, the Court explained, if a party reimburses money to the U.S. Environmental

[3] *See, e.g.,* cases cited in *Aviall,* 543 U.S. at 169.

[4] *See also id*. at 2338 (Section 113(f)(1) "authorizes a PRP to seek contribution 'during or following' a suit under § 106 or 107(a). 42 U.S.C. § 9613(f)(1). Thus, § 113 permits suit before (continued...)

Protection Agency ("EPA") pursuant to a court judgment or settlement, it is paying money to satisfy a common liability and would have a cause of action under Section 113(f)(1) for contribution. *Id*. The Court contrasted this claim with the "cost recovery" claim that is available to a PRP such as ARC that has "itself incurred cleanup costs" in the absence of an enforcement action or settlement. *Atlantic Research*, 127 S. Ct. at 2338 n.6.[5] The Court made clear that what distinguished the ARC party from the reimbursement party was not merely that the ARC party was itself sustaining the costs of doing the work (as opposed to reimbursing EPA), but also that it was acting in the absence of a governmental cleanup action and was sustaining these costs on its own and not as part of a common liability established "during or following" a Section 106 or 107 suit or by settlement.[6]

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[4](...continued)
or after the establishment of common liability.")

[5] The Second Circuit in *Consolidated Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005) analyzed the distinction similarly. It suggested that when a party spends money to clean up "due to the imposition of liability," it has not incurred costs within the meaning of Section 107(a):

> [W]hen a party 'does not conduct its *own* cleanup, it has not *incurred* recovery costs.' If a party expends funds *out of obligation* under an administrative or court order or final judgment, its liability may be 'similar to that of a tortfeasor's liability for the doctor's bills of the injured party. Payment by the tortfeasor does not mean it has incurred doctor's bills itself.'

Id. at 101 (internal citations omitted; emphasis added).

[6] Thus, except in the factual situation described in *Atlantic Research*, *Atlantic Research* did *not* overrule the longstanding view of the circuit courts that claims by PRPs pursuant to government enforcement actions or settlements are claims for "contribution," are brought pursuant to Section 113, and are restricted by its terms. *See*, *e.g.*, *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-425 (2d Cir. 1998); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116,
(continued...)

BFNT's posture at the IEL Site could not be more different from ARC's. At the IEL Site, cleanup was accomplished at the behest of EPA through the exercise of its enforcement and response authorities, and not by "voluntary" action by BFNT, as occurred in *Atlantic Research*. CERCLA provides EPA with broad authorities for effectuating the cleanup of contaminated property.[7] Section 104(a)(1) of CERCLA authorizes EPA itself to undertake response actions to remove hazardous substances or to "take any other response measure" EPA "deems necessary to protect public health or welfare or the environment," using the Hazardous Substance Superfund. 42 U.S.C. § 9604(a)(1). If EPA itself takes any such response action, Section 107(a)(4)(A) allows the United States to sue PRPs to recover "all costs" of removal or remedial action incurred by the United States that are "not inconsistent with the national contingency plan." *See* 42 U.S.C. §9607(a)(4)(A). Alternatively, Section 106(a) authorizes EPA to compel, by means of

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[6](...continued)
1121-1123 (3d Cir. 1997); *Redwing Carriers v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994); *Akzo Coatings, Inc. v. Aignor Corp.*, 30 F.3d 761, 764 (7th Cir. 1994). To be sure, the precise rationale in some of these cases is affected by *Atlantic Research*. For example, the First Circuit in *United Technologies* based its holding that parties to an administrative settlement are limited to a contribution action under Section 113 in part on their view that only the governments and "innocent parties" can use Section 107(a). *United Technologies*, 33 F.3d at 99. But the First Circuit and others reached their result requiring the use of Section 113(f) to prevent PRPs from recasting their contribution claims as something else, thereby avoiding the strictures of Section 113, including the bar on claims in Section 113(f)(2). As the First Circuit explained, to find otherwise would "produce[] judicial nullification" of Section 113(g)'s statute of limitations provisions and "emasculate[] the contribution protection component of CERCLA's settlement framework." *Id.* at 101, 102. *See also Atlantic Research I,* 459 F.3d at 836-37, *discussed infra* ¶ II.C.

[7] The authorities given to the President in CERCLA have been delegated primarily to EPA, see Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987), 3 C.F.R., 1987 Comp., p. 193.

an administrative order or a request for judicial relief, PRPs to undertake response actions. *See* 42 U.S.C. §9606(a).

As it did at the IEL Site, EPA can use a mix of these approaches to achieve the appropriate site cleanup. EPA began taking response action at the site in 1984 to protect public health and the environment from releases of hazardous substances at the Site. EPA listed the IEL Site on the National Priorities List, performed a Remedial Investigation/Feasibility Study and other monitoring and investigations, selected a cleanup remedy for the Site, and secured the Site's cleanup and recovered its costs from PRPs through its CERCLA enforcement authorities. EPA issued two unilateral administrative orders to BFNT (for an alternate water supply and for design of the final selected remedy), filed suit under Section 107(a)(4)(A) against it to recover costs in 1989, and ultimately entered into a settlement with BFNT for reimbursement of response costs and implementation of the final site cleanup. But for EPA's enforcement and response actions, BFNT would not be cleaning up the IEL Site and would not have sustained the costs it has to date.

Further, unlike ARC, BFNT is not "incurring its own costs" when it performs response actions at the Site. Rather, it has sustained these expenses to extinguish a common liability, shared by all IEL PRPs, for the site cleanup. If EPA had cleaned up the entire Site itself and sued BFNT under Section 107(a)(4)(A), BFNT's reimbursement of costs to EPA to extinguish this liability, as discussed, would have provided BFNT with the quintessential contribution claim described by the Supreme Court. BFNT's performance of work in response to the government's Section 107(a) claim, to reduce the amount that EPA would have to spend on cleanup and

ultimately seek to recover from BFNT, should provide BFNT the same remedy as BFNT's reimbursement of costs that EPA incurred in performing that same work.

Finally, at least at the IEL Site, where EPA was exercising its authorities to achieve cleanup, "all costs of removal or remedial action" incurred (or to be incurred) by EPA (not inconsistent with the NCP) and any additional response actions deemed necessary to the cleanup are part of the "common liability" for the site cleanup, which is shared jointly and severally by the IEL PRPs. Any costs BFNT reimburses to EPA or any necessary work it performs goes toward extinguishing this common liability. Thus, any claim by BFNT to recover necessary[8] cleanup costs it has expended (either in reimbursement to EPA for work EPA has performed or in performing necessary response actions itself) is in fact a "contribution" claim, must be brought pursuant to Section 113(f), is subject to the restrictions of Section 113(f)(2), and is barred as against the *de minimis* settlors.

C. Even if BFNT Also Has a Claim Under Section 107(a)(4)(B), *Atlantic Research* Compels the Exclusive Use of Section 113.

Even if this Court determines that BFNT has *both* a claim for "cost recovery" and "contribution," the Supreme Court would require the exclusive use of Section 113. In order to

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[8] Section 107(a)(4)(B) allows PRPs to recover only "necessary" costs of response (which must also have been incurred "consistent with the NCP"). 42 U.S.C. § 9607(a)(4)(B). Thus, any "unnecessary" costs incurred by private parties are not be recoverable under CERCLA. *See, e.g.*, *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994) (negotiation fees that primarily protect PRPs interests and litigation fees are not necessary costs of response). (Note, however, that EPA's response costs need not be "necessary" to be recoverable under Section 107(a)(4)(A). They need merely be "not inconsistent with the NCP." *See, e.g., United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992).

harmonize Sections 107(a) and 113(f) and to prevent the latter from becoming "meaningless," the Eighth Circuit in *Atlantic Research I* stressed that:

> liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality. But parties such as Atlantic, which have not faced a CERCLA action, and are thereby barred from § 113, retain their access to § 107. This resolution gives life to each of CERCLA's sections, and is consistent with CERCLA's goal of encouraging prompt and voluntary cleanup of contaminated sites.

459 F.3d at 836-37 (citations omitted). The Supreme Court, in upholding the decision below, explained the Eighth Circuit's reasoning as follows:

> The court reasoned that § 107(a)(4)(B) authorized suit by any person other than the persons permitted to sue under § 107(a)(4)(A). Accordingly, it held that § 107(a)(4)(B) provides a cause of action to Atlantic Research. To prevent a perceived conflict between § 107(a)(4)(B) and § 113(f)(1), the Court of Appeals reasoned that *PRPs that 'have been subject to §§ 106 or 107 enforcement actions are still required to use § 113*, thereby ensuring its continued vitality.' We granted certiorari, *and now affirm*."

Atlantic Research, 127 S. Ct. at 2335 (emphasis added, citations omitted). The Supreme Court's selection of this passage to quote immediately before its statement of affirmance strongly indicates that the Court would require a PRP that has a Section 113(f)(1) cause of action for contribution to use it. Elsewhere, the Court's opinion further indicates that it would not endorse a scheme that would allow a PRP to choose between a Section 113(f) "contribution claim" and a Section 107(a) "cost recovery" claim to evade the statutory limitations of Section 113. *See Atlantic Research*, 127 S. Ct. at 2339.[9] Taken together, these passages show that the Court

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[9] Requiring that parties that have a Section 113(f) cause of action use it, and not Section 107(a), is also compelled by the structure and policies underlying CERCLA. Courts have widely recognized that in enacting the SARA Amendments to CERCLA in 1986, Congress wanted to promote settlement. *See generally*, *United States v. Cannons Eng'g Corp.*, 899 F.2d 79 (1st Cir.
(continued...)

would not allow BFNT, which clearly has a cause of action under Section 113(f)(1), to sue other PRPs under Section 107(a) instead.

III. CONGRESS INTENDED TO PROVIDE *DE MINIMIS* PARTIES WITH COMPLETE PROTECTION FROM FURTHER LITIGATION BY OTHER PARTIES

Even if the Court were to find that PRPs in the position of BFNT have an action under Section 107(a)(4)(B), such a claim is not available against the *de minimis* settlors. Allowing BFNT to pursue a Section 107 claim against PPG and Morgan, once the *de minimis* decrees are entered, would be inconsistent with Congress' intent that *de minimis* parties that settle with the government finally resolve their liability.

Unlike other federal environmental laws, CERCLA contains express provisions concerning and encouraging certain types of settlements, including *de minimis* "final" and other

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[9](...continued)
1990). *See also* H.R. Rep. 99-253, pt. 1, at 101 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2883 ("Negotiated private party actions are essential to an effective program for cleanup of the nation's hazardous waste sites and it is the intent of this Committee to encourage private party cleanup at all sites."). While SARA contains many provisions designed to promote settlement, one of the most significant such provisions is Section 113(f)(2), which protects settlors from claims for contribution for the matters addressed in the settlement. This provision was intended to encourage settlements by providing PRPs with a measure of finality. *See* H.R. Rep. No. 99-253, pt. 1, at 101 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 (Exhibit 1). Congress intended Section 113(f) to govern all CERCLA claims for contribution, including claims by parties that perform work, such as BFNT. See H.R. Rep. No. 99-253, pt. 1, at 80, 1986 U.S.C.C.A.N. 2835, 2862 ("Parties who settle for *all or part of a cleanup* or its costs, or who pay judgments as a result of litigation, can attempt to recover some portion of their expenses and obligations in contribution litigation from parties who were not sued in the enforcement action or who were not parties to the settlement.") (emphasis added). *See also id.* at 79, 1986 U.S.C.C.A.N. at 2861; Senate Rep. No. 99-11 at 44 (1985) (Exhibit 2); *United Techs*., 33 F.3d at 101; *Akzo Coatings, Inc., v. Aigner Corp.*, 30 F.3d at 764-6 (7th Cir. 1994). If PRPs whose claims fall under Section 113(f) can do an end run around Section 113(f)(2) by bringing a Section 107(a)(4)(B) action, a strong incentive for settlement will be eroded.

"expedited" settlements. These provisions are found largely in Section 122 of CERCLA, 42 U.S.C. § 9622, most of which Congress added in 1986 in recognition of the need to proceed promptly and without time-consuming litigation to clean up contaminated sites with the active participation of responsible parties. H.R. Rep. No. 99-253, pt. 3, at 29 (1985), *reprinted in* 1986 U.S.C.C.A.N 3038, 3052 (Exhibit 3).

Section 122(g)(1) (Expedited final settlement), which addresses settlements with *de minimis* parties, provides in pertinent part as follows:

> Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible *reach a final settlement* with a potentially responsible party in [a] . . . civil action under section 9606 or 9607 of this title [CERCLA Sections 106, 107] if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President . . . .
>
> (A) Both of the following are minimal in comparison to other hazardous substances contributed by that party to the facility:
>
> (i) The amount of the hazardous substances contributed by that party to the facility.
>
> (ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

42 U.S.C. § 9622(g) (emphasis added). Congress enacted Section 122(g) to relieve *de minimis* parties, those who had sent hazardous substances that were "minimal" in terms of amount and toxic or other hazardous effects, from "prolonged and costly litigation." 131 Cong. Rec., H11086 (Dec. 5, 1985) (statement of Rep. Glickman) (Exhibit 4). With the *de minimis* provisions, Congress was attempting to encourage expedited settlements and to eliminate the practice that had evolved whereby *de minimis* parties were being sued by major PRPs and were sustaining enormous litigation costs, well above their fair share of response costs for a Superfund site. To prevent this injustice, Congress enacted Section 122(g), which provides for EPA to

enter into “final settlements” with *de minimis* parties “as promptly as possible.” 42 U.S.C. § 9622(g).

Congress sought to ensure that settlements with *de minimis* parties provided appropriate finality and resolution of liability:

> To ensure that settlements with de minimis parties provide such parties with an appropriate level of finality, new subsection 122(g)(2) authorizes the Administrator to provide covenants not to sue or releases from liability when doing so is in the public interest.

H.R. 99-253, pt. 3, at 31 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3054 (Exhibit 3). Indeed, Congress intended that the liability of *de minimis* parties be completely resolved, to protect these parties from “very, very expensive cleanups and serious litigation.” *Id*. Similarly, a House Report makes clear that *de minimis* settlements were intended to be final:

> Subsection (g) of section 122 authorizes the Administrator [of EPA] to reach a final settlement with and grant releases of liability to de minimis contributors, even with respect to conditions unknown at the time of settlement.

H.R. Rep. 99-253, pt. 5, at 64 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3187 (Exhibit 5).

In legislative history regarding a precursor bill to what ultimately became the 2002 amendments to CERCLA, a Senate Report emphasized the importance under Section 122(g) of “providing an early, streamlined process for allocation and settlement of liability that gives . . . certainty that [the de minimis settlor’s] *responsibility at the site is resolved* and that they will be *protected from unnecessary and costly lawsuits* by other parties . .” S. Rpt. No. 103-349, at 53 (1994) (emphasis added) (Exhibit 6). The Senate Report further noted that the proposed amendments to Section 122(g) would require that the President explain in writing any decision *not* to enter into expedited “final settlements” under this section. *Id*. (Emphasis added). Section

122(g) was ultimately amended in 2002 to contain such a requirement.[10] 42 U.S.C. § 9622(g). As stated during the Congressional debate on the 2002 amendments, their purpose was, *inter alia*, "to provide Superfund liability relief for . . . [those who] disposed of, or arranged disposal of, small amounts of hazardous waste." 147 Cong. Rec. S14063-03 (Exhibit 7) (Dec. 20, 2001) (Statement of Sen. Jeffords). While particularly focusing on the potential for unfairness to small businesses, Congress made clear its intent to protect those who become "enmeshed in the *financial quagmire of Superfund liability*" when disposing of ordinary trash, 147 Cong. Rec. H10893 (Dec. 19, 2001) (Statement of Rep. Gillmor) (emphasis added), or sending "a very small amount of waste to a site." *Id*. (Statement of Rep. Duncan) (Exhibit 8). If the Court were to read Section 107(a)(4)(B) of CERCLA as allowing a virtually identical claim to survive a *de minimis* settlement, it would undermine the very protections from costly and protracted litigation that Congress intended to provide for *de minimis* parties in Section 122(g).

Courts have effectuated Congressional intent to protect *de minimis* parties from further litigation for recovery of response costs, no matter how those claims were styled. For example, in denying a claim for indemnification brought against *de minimis* settlors, the First Circuit determined that "[a]lthough CERCLA is silent regarding indemnification, we refuse to read into the statute a right to indemnification that would eviscerate [Section] 113(f)(2) and allow non-settlors to make an end run around the statutory scheme". *United States v. Cannons Eng'g*, 899

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[10] The 2002 amendments to Section 122(g) were part of The Small Business Liability Relief and Brownfields Revitalization Act ("2002 Amendments"). The 2002 Amendments provided relief aimed particularly at small businesses, including by authorizing *de micromis* and MSW (municipal solid waste) parties, and requiring notification by the President of parties eligible for *de minimis* settlements. 42 U.S.C. § 9622(g).

F.2d 89, 92 (lst Cir. 1990). *See also United States v. Alexander*, 771 F. Supp. 830, 832 (S.D.Tex. 1991), *vacated on other grounds,* 981 F.2d 250 (5th Cir. 1993) (*de minimis* defendants who settled in partial consent decree were shielded from contribution and indemnification claims by Section 9613(f)(2)); *Dravo Corp. v. Zuber*, 804 F. Supp. 1182, 1189 (D. Neb. 1992), *aff'd*, 13 F.3d 1222 (8th Cir. 1994) (Sections 122(g) and 113(f) bar claims for monetary and declaratory relief against *de minimis* settlors); *United States v. Pretty Products*, 780 F. Supp. 1488, 1492-96 & nn. 3, 7 (S.D. Ohio 1991) (dismissing contribution claims and various claims under Ohio state law and common law, including those labeled as indemnity and breach of contract claims). *But see, e.g.*, *Avnet, Inc. v. Allied Signal, Inc.*, 825 F. Supp. 1132, 1138-41 (D.R.I. 1992) (while determining that claims against *de minimis* settlors were prohibited by Sections 113(f)(2) and 122(g)(5), the court distinguished the costs at issue from "independent" response costs) (citations omitted). In sum, courts have interpreted Section 122(g) to fulfill Congressional intent to protect *de minimis* settlors from *any* further claims or litigation for additional response costs. Thus, even if BFNT had a claim under Section 107, that claim would be barred.

<u>CONCLUSION</u>

In this case, after careful consideration, EPA determined that the amounts to be paid by PPG and Morgan under the proposed *de minimis* settlements constitute their fair share of "all response costs" "incurred by any person," plus a premium. *See* Motion to Enter at 75 and 18-26 (Doc. #524) and PPG Decree ¶ 19 and Morgan Decree ¶ 21. Therefore, in accordance with Sections 113(f)(2) and 122(g), PPG and Morgan should receive a "final settlement" and full protection from all claims for "all response costs . . . incurred" by anyone at the Site. These

costs include those incurred or to be incurred by BFNT. The Supreme Court's decision in *Atlantic Research* should not be read to change this result. EPA has to date settled with over 30,000 *de minimis* parties. Any interpretation that allowed *de minimis* settlors to be dragged into additional litigation would be contrary to Congressional intent as set forth in Section 122(g). If these parties must engage in the expense of protracted multi-party litigation -- particularly when their allocated share of liability may be less than the cost of that litigation -- the protection Congress intended to provide in Section 122(g) would be eviscerated. Accordingly, the United States respectfully requests that the Court execute the *de minimis* decrees lodged with the Court and enter each of them as a final judgment in this action with respect to the relevant settling Defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing United States' Response to Bridgestone/Firestone's Surreply in Opposition to United States' Motion for Entry of *De Minimis* Decrees was filed electronically on September 28, 2007. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's Electronic Case Filing System.

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